Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	**CC Docket No. 99-68**

COMMENTS OF CABLEVISION LIGHTPATH, INC.

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COMMENTS

Cablevision Lightpath, Inc. ("Lightpath"), by its attorneys, hereby respectfully submits these comments in response to the Federal Communications Commission's ("Commission's") Public Notice, FCC 00-227, released June 23, 1999, in the above-captioned matter.[1/] Lightpath is a full service, facilities-based competitive local exchange carrier ("CLEC") that offers an array of high-quality telecommunications services to a wide variety of business and residential customers, including Internet service providers ("ISPs"),[2/] throughout its service areas in New York, Connecticut, and New Jersey. Given that the termination of a call to ISPs and other similarly situated customers imposes the same costs on carriers as other "local" calls, such calls should be treated as local for compensation purposes, as provided for in section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"). To that end, Lightpath urges the Commission to retain the compensation framework it

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Public Notice, CC Docket Nos. 96-68, 99-68, FCC 00-227 (rel. Jun. 23, 1999) ("Public Notice").

2/ As a facilities-based carrier, Lightpath has installed three (3) 5ESS switches and thousands of miles of fiber to provide competitive telecommunications services to the public.

established in the Local Competition Order,[3/] which would be consistent with the classification of this service as local. If the Commission intends to establish a federal inter-carrier compensation scheme, Lightpath recommends the Commission consider the model the New York Public Service Commission ("NY PSC") adopted after a comprehensive proceeding.[4/] As a full service facilities-based carrier, Lightpath considers the FCC's determinations in this proceeding as critical to continued expansion of its competitive services as such decisions will impact Lightpath's ability to recover its network costs.

I. INTRODUCTION AND SUMMARY

The Commission released a Declaratory Ruling and Notice of Proposed Rulemaking on February 26, 1999, in response to a number of requests for clarification as to whether local exchange carriers ("LECs") are entitled under section 251(b)(5) of the 1996 Act to receive reciprocal compensation for the termination of traffic to ISPs.[5/] Utilizing an end-to-end analysis of these calls, the Commission concluded that, although such traffic was not local, state commissions were free to determine whether reciprocal compensation should apply to this

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[3/] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (rel. Aug. 8, 1996) ("Local Competition Order"), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 3d 753 (8th Cir. 1997), aff'd in part and vacated in part and rev'd in part sub nom. AT&T Corp. v. Iowa 1068 (8th Cir. 1997), aff'd in part and vacated in part sub nom. Iowa Utils. Bd. V. FCC, 120 F. Utils. Bd. 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996); Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997); further recon. pending.

[4/] Case 99-C-0529, Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, New York Public Service Commission Opinion 99-10, Opinion and Order Concerning Reciprocal Compensation (Aug. 26, 1999) ("NY PSC Order")(attached hereto as "Exhibit A").

[5/] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd 3689 (rel. Feb. 26, 1999) ("Declaratory Ruling").

traffic.[6/] In response to the United States Court of Appeals for the District of Columbia's Order vacating the Commission's conclusion that ISP-bound traffic is not local, the Commission now seeks comments on several issues identified by the court. Specifically, it seeks comment on the "jurisdictional nature of ISP-bound traffic, . . . the scope of the reciprocal compensation requirement of section 251(b)(5), and on the relevance of the concepts of 'termination,' 'telephone exchange service,' 'exchange access service," and 'information access.'"[7/] The Commission also asks commenting parties to describe any new or innovative inter-carrier compensation arrangements for the termination of ISP-bound traffic.[8/]

In these comments, Lightpath initially addresses the nature of ISP traffic, and contends that, because such traffic terminates at the ISP, it should be considered local. Regardless of the outcome of the jurisdictional question, Lightpath urges the Commission to continue to apply the reciprocal compensation framework set forth in the Local Competition Order to calls terminated to ISPs. In response to the Commission's request for information on new or innovative inter-carrier compensation mechanisms, Lightpath describes the approach the NY PSC has adopted to ensure LECs are adequately compensated LECs for terminating ISP-traffic. Lightpath recommends that the Commission consider this approach should it conclude that modification of the existing reciprocal compensation framework is needed to ensure that LECs are appropriately compensated for terminating ISP traffic.

The NY PSC's plan has a number of advantages. It correctly acknowledges that LECs incur costs when they utilize their networks to terminate calls to ISPs, and it ensures that carriers that have invested in networks designed to provide service to geographically dispersed customers

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[6/] The Commission did indicate that it retained the right to develop and implement an inter-carrier compensation scheme for traffic terminated to ISPs. Declaratory Ruling, 14 FCC Rcd at 3707.

[7/] Public Notice at 2.

are appropriately compensated for the use of their networks in terminating such calls. The New York structure appropriately accounts for the level and type of CLECs' network investment and, significantly, does so within the existing transport and termination compensation framework the Commission established in the Local Competition Order. It thus addresses the concerns of overcompensation while still ensuring that facilities-based LECs are compensated appropriately for costs associated with the use of their networks to terminate their competitors' calls.

Furthermore, to minimize market disruptions, Lightpath urges the Commission to "grandfather" the reciprocal compensation provisions in currently effective interconnection agreements, as carriers have made business plans under the assumptions of the interconnection agreement terms. Lightpath appreciates the FCC's efforts to address this important issue, as the establishment of clear rules and/or guidelines for intercarrier compensation will help to equalize the bargaining position of ILECs and CLECs in interconnection negotiations. In light of this, Lightpath is hopeful that the FCC will provide such guidelines as a result of this proceeding.

II. ISP-BOUND TRAFFIC SHOULD BE CONSIDERED "LOCAL" FOR PURPOSES OF APPLYING §251(B)(5) OF THE 1996 ACT.

The question remanded to the Commission is whether ISP-bound traffic should be considered local. Lightpath continues to be a proponent of the view universally held by CLECs that an ISP-bound call is a local call. The D.C. Circuit was correct when it noted that calls to ISPs appear to terminate at the ISP, given the Commission's definition of "termination": "the switching of traffic that is subject to 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises."[9/]

[8/] Declaratory Ruling, 14 FCC Rcd at 3707.

[9/] Bell Atlantic Telephone Companies v. Federal Communications Commission, 206 F.3d 1, 6 (D.C. Cir. 2000) ("D.C. Cir. Decision").

A call to an ISP originates and terminates in the same way as any other local call.[10/] An Internet user, such as a Bell Atlantic customer, dials an ISP's local number to initiate the call. The call travels through the public switched telephone network -- over the local loop, through the end-office and/or tandem switches -- until it reaches the end office serving the ISP the customer dialed. The end office routes the call through business access lines or digital trunks until it reaches the NXX number corresponding with the ISP where the call terminates at the ISP's equipment -- usually a modem bank or remote server. Such a call placed over the public switched telephone network is considered terminated when it is delivered to a local exchange end user bearing the called telephone number. Indeed, a local call to an ISP's NXX number does not vary in any manner from any other local call terminated at a PBX or customer station operated by a bank, a large corporation, a customer call center, or a radio station.

After a local call is terminated to an ISP's NXX number, the ISP often will initiate a separate and distinct Internet connection. Specifically, the ISP converts the call into digital form and breaks it into data "packets" that are then routed over its private network or the packet-switched Internet backbone to computers and databases in the same local calling area or in other states or countries. The ISP's subsequent service is analogous to when a call is terminated at a business's PBX, and then the call is forwarded to another location outside the calling area. Just as an incumbent LEC ("ILEC") treats the call to that business's PBX as local, regardless of where that call is subsequently routed, so too should it treat the call to the ISP's NXX as local.

Indeed, ILECs have treated calls to local ISP numbers as local calls. For example, they charge their own customers local rates for traffic to ISPs. In seeking FCC approval to provide

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[10/] Except for the limited instances when end users lack local dial-up Internet access because they reside in areas not served by local ISPs or are travelling and must dial a toll call to reach their ISPs, calls to ISP reflect the model of a local call. ISP-bound calls referenced herein are of the local variety.

"Internet Access Services," Bell Atlantic, for example, described calls to access ISPs as local: "For dial-up access, the end user will place a local call to the Bell Atlantic Internet hub site from either a local residence or business line. . . . Bell Atlantic's [ISP] vendor will subscribe to local telephone services -- either standard business line or ISDN -- to receive the call."[11/] Bell Atlantic and other ILECs have also considered these calls as local for purposes of billing, reporting, and interstate and intrastate jurisdictional separations.[12/] In addition, ILECs have treated calls to their ISP customers as local and have billed other carriers for calls terminated to the ILECs' ISP customers.[13/]

It is also not surprising that the Commission has long treated ISP-bound calls as local, given that ISPs and calls to ISPs have all the salient characteristics, respectively, of local users and local calls. A significant majority of ISP-bound calls are made dialing local, toll-free calls for which access charges appropriately are not assessed. These calls are billed as local calls (generally at a flat rate monthly charge[14/]), and the Commission treats these calls as local for purpose of its jurisdictional separations rules. Moreover, the Commission also treats the ISPs themselves as consumers of local service: they purchase local service from the LECs' local business tariffs, and the LECs bill ISPs subscriber line charges.[15/]

[11/] In the Matter of Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Enhanced Internet Access Services, Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX, CCB Pol. 96-09 at 3 (filed May 5, 1997) (emphasis added).

[12/] Case No. U-11178, In the Matter of the Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc., and Ameritech Information Industry Services on Behalf of Ameritech Michigan, Opinion and Order at 11 (Jan. 28, 1998) ("Michigan Order").

[13/] Michigan Order at 9 (noting that Ameritech billed Brooks Fiber for calls originating on Brooks' network and terminating to ISP customers on Ameritech Michigan's network).

[14/] Whether such monthly rates adequately compensate the originating carrier for its customers' calls (including any termination charges it must pay the terminating LEC), is a separate issue from whether carriers are adequately compensated for the use of their networks when they terminate the calls of their competitors' end users.

[15/] 47 C.F.R. §§ 69.104 and 69.152 (1999).

III. CARRIERS MUST BE FAIRLY COMPENSATED FOR THE COSTS THEY INCUR TO TERMINATE ISP-BOUND TRAFFIC

A. It Is an "Indisputable" Fact that LECs Incur Costs To Terminate Traffic.

Although there is a dispute about the nature of ISP traffic, there can be no question that carriers incur costs when their networks are utilized to terminate calls to ISPs. The Commission recognized as much in its Notice of Proposed Rulemaking in CC Docket No. 99-68, when it explicitly stated that "LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network."[16/] The NY PSC similarly echoed this fact in rejecting Bell Atlantic's proposal to deny all reciprocal compensation for termination of ISP-bound traffic, because to do so "would be to unfairly ignore the indisputable fact that CLECs completing these calls incur costs in doing so."[17/]

B. The Costs that Lightpath Incurs in Terminating ISP-Bound Traffic Are the Same as Those It Incurs in Terminating Other ILEC Originating Traffic.

As a facilities-based carrier, Lightpath utilizes the same network facilities to terminate traffic to its ISP customers that it uses to terminate any other traffic. Lightpath provides service to business customers using Lucent Technologies 5ESS switches and an extensive network of fiber optic SONET rings and high capacity transport links.[18/] Lightpath uses the transport functions performed by the SONET rings and other fiber facilities plus ancillary switching facilities to originate and terminate calls over the vast geographic area its 5ESS switches serve in New York, Connecticut, and New Jersey. When Lightpath terminates a call originated on Bell Atlantic's network, for example, Lightpath transports the call from the point of interconnection to its switch. From there, Lightpath transports the call over its fiber optic network to the called

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[16/] Declaratory Ruling, 14 FCC Rcd at 3707.
[17/] NYPSC Order at 61.
[18/] Lightpath utilizes the same facilities to provide service to its residential customers but utilizes hybrid fiber coax to provide the "last mile" link.

party. Lightpath's ISP customers, like its other commercial customers, are geographically dispersed throughout Lightpath's service territories. From a network and cost perspective, serving an ISP is exactly like serving any other commercial customer, such as customer call centers or hospitals.

A prominent feature of Lightpath's network is that its switch/transport configuration is functionally equivalent to an ILEC's tandem switch-based network, which is consistent with the Commission's finding in the Local Competition Order.[19/] The Commission has recognized that the additional costs incurred to transport and terminate a competing carrier's traffic "are likely to vary depending on whether tandem switching is involved."[20/] In recognition of the fact that alternative technologies deployed by CLECs may provide the same functionality as tandem switching, the Commission took into account alternative technologies and permitted CLECs to charge the tandem rate "[w]here the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch."[21/] In New York, for example, Lightpath has deployed a network architecture that provides functionality equivalent to that provided by Bell Atlantic's tandem switch. Lightpath's 5ESS switch/SONET ring network enables Bell Atlantic to terminate calls to all of Lightpath's widely dispersed customers by delivering traffic to a mutually agreed upon single point of interconnection on Lightpath's network. Thus, Lightpath's network satisfies the standard of functional equivalency as

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19/ Local Competition Order, 11 FCC Rcd at 16042.
20/ Id.
21/ Local Competition Order, 11 FCC Rcd at 16042. The NY PSC adopted a somewhat different test for functional equivalency, specifically "the ability to terminate calls to all customers served by a carrier's unique, stand alone network by delivery to a single point of interconnection." NY PSC Order at 23, citing Case 94-C-0095, Proceeding to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Order Instituting Framework for Directory Listings, Carrier Interconnection and Carrier Compensation at 6, n.1 (Sept. 27, 1995).

established by this Commission and the NY PSC to evaluate whether a CLEC is entitled to tandem termination rates.

C. The Key Concepts Established by the Commission for Transport and Termination Rates in the Local Competition Order Should Continue To Apply to ISP-Bound Traffic.

The Commission embraced several key concepts in setting transport and termination rates that should continue to govern any regime for compensating LECs for terminating ISP-bound traffic. The Commission established transport and termination rates based on forward-looking economic costs that reflect the "additional costs" incurred in terminating traffic, including a share of common costs. This approach continues to provide an imminently sound basis for setting transport and termination rates. The Commission further concluded that rates should be symmetrical; that is, the rates CLECs charge should be the same as those set by the ILECs, unless a CLEC can demonstrate that its actual costs are higher.[22/] The adoption of symmetrical compensation is critical to minimizing costs, ensuring competitive neutrality, and encouraging economic efficient network design. More specifically, the Commission identified a number of advantages of this approach that are fully applicable to ISP-bound traffic and that are as valid today as when they were first adopted. Among the benefits of a symmetrical rate structure are that it: (1) provides appropriate incentives to set reasonable rates; (2) equalizes bargaining power between CLECs and ILECs; and (3) is administratively easier to implement.

When reciprocal compensation rates are based on the ILECs' cost studies (which they already are required to perform), to the extent ILECs also must pay these rates, they have an incentive both to minimize their costs and to accurately conduct the cost studies that underlie these rates. Moreover, as the Commission itself explained, "[a] symmetric compensation rule

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22/ Local Competition Order, 11 FCC Rcd at 16042.

gives [a CLEC] correct incentives to minimize its own costs of termination. . . ."[23/] There is evidence that these incentives are working as the Commission intended. As traffic balances have tended not to benefit ILECs -- contrary to their expectations when they initially proposed higher rates for reciprocal compensation and opposed a bill and keep mechanism -- it is no surprise that they now are proposing revisions to their cost studies to more accurately reflect terminating costs. In New York, for example, Bell Atlantic proposes to lower transport and termination rates by excluding vertical feature costs from the rate for terminating switching, on the grounds that vertical features are not, after all, used to terminate calls and therefore should be excluded from the rate structure. Although there is much to be debated in the details of this proposal, and Lightpath reserves all rights with respect to its participation in any related proceeding, Lightpath certainly agrees in principal that termination rates should not include costs that are not in fact incurred. Bell Atlantic's recent efforts to exclude elements from local switching rates stands in stark contrast to its earlier attempts to load those rates with potentially inappropriate costs. For example, Bell Atlantic sought to include charges for operation support systems in its switching costs.[24/] Bell Atlantic's recent efforts to reduce rates is evidence that the market forces are working as the Commission intended. Indeed, as a general matter, reciprocal compensation rates are declining.

The use of symmetrical rates also blunts the uneven bargaining power enjoyed by ILECs. ILECs continue to maintain market power in virtually all their operating areas, and as the Commission correctly notes, without symmetrical rates, an ILEC could use its "bargaining

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[23/] Local Competition Order, 11 FCC Rcd at 16040.

[24/] Case No. 95-C-0657, Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corp., WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service By New York

strength to negotiate excessively high termination charges that competitors would pay . . . and excessively low termination rates that the incumbent LEC would pay interconnecting carriers."[25/] The potential anti-competitive effect of eliminating symmetrical rates alone is justification enough to retain them.

A further critical component of symmetrical rates is that CLECs should be compensated at the ILECs' tandem rates when the CLEC terminates traffic using network facilities that are functionally equivalent to the ILECs' tandem switch. To do otherwise would be to punish CLECs for deploying networks in an efficient manner rather than undertaking the decidedly uneconomic approach of utilizing a ubiquitous tandem/end office switching architecture before obtaining sufficient customer volumes and concentration to justify the expenditure such a build-out would entail.

Moreover, utilizing ILEC rates promotes administrative efficiency. CLECs would be burdened with the additional cost and effort of developing their own cost studies, an event in itself that would encourage more contentious -- and thus extended and costly -- proceedings. The Commission's prior determination that a symmetrical model would be "administratively easier to derive and manage" remains valid.[26/] The ILECs have already expended their own resources (and caused to be expended the resources of state commissions and the ILECs' competitors) in vigorously defending and justifying these rates. Any suggestion that CLECs should perform cost studies should be perfunctorily rejected, since the Commission has correctly recognized that "larger LECs are generally in a better position to conduct a forward-looking

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Telephone Company and Sections of New York Telephone Company's Tariff No. 900, Order Approving Tariff and Directing Revisions at 13 (June 12, 1998).

25/ Local Competition Order, 11 FCC Rcd at 16041.

26/ Local Competition Order, 11 FCC Rcd at 16041.

economic cost study than smaller carriers."[27/] As non-dominant participants in virtually all markets, there simply is no need for CLECs even to perform cost studies unless one wishes to make a showing to a state commission that its costs of transport and termination actually are higher than the ILEC in the local serving area.

In sum, the framework for establishing transport and termination rates set forth in the Local Competition Order remains as valid today as when the Commission first adopted it, and it remains as valid for the termination of ISP-bound traffic as for the termination of all other traffic. The ILECs' complaints about paying too much to CLECs for terminating ISP-bound traffic offer no justification for the wholesale abandonment of this framework. To change this framework would jeopardize the development of facilities-based competition by undercompensating carriers which are investing in networks to serve geographically dispersed customers. The NY PSC completed a comprehensive proceeding on the issue of reciprocal compensation, and the conclusions it reached in that proceeding provide an instructive and useful model for inter-carrier compensation. As described below, the NY PSC's model preserves the advantages of the Commission's reciprocal compensation model and strikes a reasonable balance between the seemingly mutually exclusive concerns of ILECs and CLECs.

IV. THE NEW YORK MODEL

A. How the New York Model Works.

The NY PSC recently adopted a reciprocal compensation model that retains the underlying characteristics of the Commission's original framework, while addressing the concerns of both originating and terminating carriers. The NY PSC concluded that, although

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[27/] Id. at 16040.

"the reciprocal compensation system is not fundamentally broken,"[28/] market evolution merits a review of the current framework and an adjustment to account for that evolution. Significantly, the plan achieves this result in a manner that maintains the appropriate economic nexus between the CLECs' underlying costs and the rates they are allowed to charge. It assumes that tandem-based rates are confined to those instances where the CLEC has built a network with tandem-like functionality.

The NY PSC recognizes that any sound reciprocal compensation plan must be grounded in an economic cost analysis,[29/] and as such, it cannot ignore the significant network investment of facilities-based carriers. Regardless of whether traffic imbalances are the result of "reasonable and honest business plans," or because of the ILECs' "intransigence about opening mass markets,"[30/] an appropriate compensation framework must acknowledge the underlying costs carriers incur to terminate local traffic.

The New York plan establishes a two-tiered compensation rate structure. Carriers with a ratio of incoming to outgoing traffic of greater than three-to-one for a three-month period are presumed to carry a substantial amount of "convergent" traffic.[31/] All traffic below the ratio will

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[28/] NY PSC Order at 58.
[29/] Id. at 57.
[30/] NY PSC Order at 57. To the extent ILECs establish entry barriers, CLECs may be forced to identify niche markets or markets that are particularly lucrative, rather than attempt to provide service to an entire serving area at once.
[31/] The NY PSC defines "convergent" traffic as that generated by customers with large volumes of inbound traffic, but little or no outbound traffic. ISP traffic and chatlines are examples of convergent traffic. The NY PSC's order governs all convergent traffic, not just ISP traffic. Id. at 8. Although Lightpath recommends the framework the NY PSC adopted, the Commission should modify the framework in one respect. Several parties to the New York proceeding suggested a five-to-one traffic ratio. After careful consideration of all the facts and evidence in the record, the NY PSC staff concurred in this recommendation. The commission, however, with little explanation, adopted the three-to-one ratio instead. The three-to-one ratio is too low and may cause truly local traffic to be unlawfully under-compensated. Lightpath therefore recommends that if the Commission adopts a mechanism like the one in New York, it set the ratio of inbound-to-outbound traffic at five-to-one.

be compensated at the ILEC's tandem rate, and all traffic above that ratio will be compensated at the end office rate.

A critical component of the New York plan is that it merely creates a presumption that traffic ratios above the three-to-one level imply lower costs, and that carriers may thus be sufficiently compensated at the lower end office rate. A carrier that can demonstrate it has invested in a full-service, facilities based "network with tandem-like functionality, designed to both send and receive customer traffic,"[32/] may rebut the presumption that its costs are adequately compensated using the ILEC's end-office based termination rate. If the presumption is rebutted, as Lightpath has successfully done,[33/] then the compensation paid to the carrier reverts to its previous, higher level. The originating LEC also must make the terminating carrier whole for the difference between the two rates, going back to the time the terminating carrier filed its rebuttal presentation.[34/]

The NY PSC established an illustrative, but not complete, list of network design factors that could be considered in rebutting the presumption that a CLEC enjoys lower terminating costs: "the number and capacity of central office switches; the number of points of interconnection offered to other local exchange carriers; the number of collocation cages; the presence of SONET rings and other types of transport facilities; [and] the presence of local distribution facilities such as coaxial cable and/or unbundled loops."[35/]

[32/] NY PSC Order at 60-61.
[33/] Case 99-C-0529, Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation: Filing of Cablevision Lightpath, Inc. to Rebut the Presumption That a Substantial Portion of Terminated Traffic is Subject to Compensation at End-Office Rate, Order Directing Reciprocal Compensation Rate (Dec. 9, 1999) ("CLI Order").
[34/] NY PSC Order at 61. The NY PSC requires these provisions to be set forth in all tariffs containing reciprocal compensation provisions. Id.
[35/] Id. at 60.

The New York plan correctly focuses on whether a CLEC's network has tandem-like characteristics for which a higher level of compensation is appropriate, rather than the number and types of its customers. This approach recognizes that it is the network investment, and not the current number and type of CLEC customers, that should determine the cost structure necessary to recover such network costs.[36/] It also acknowledges that new market entrants will not necessarily replicate the network configurations of the incumbents, yet they may still provide the same functionality as the embedded network. That is, current switch capacity and transmission capabilities allow tandem functionality with less switch investment and more transmission investment. So long as an ILEC can deliver traffic to a CLEC with a single point of interconnection and reach all customers within the ILEC's serving area, the NY PSC considers two networks to be functionally equivalent and entitled to commensurate compensation.[37/]

B. The NY PSC Plan Represents a Reasonable Compromise Between the Concerns of ILECs and CLECs.

The NY PSC plan fairly and economically addresses the interests of both ILECs, who claim to be burdened with excessive local traffic termination costs, and the CLECs that have made significant capital investments in their full-service networks. In short, the New York plan provides the ILECs a degree of rate relief for unbalanced traffic, yet it does so in a manner that does not deprive CLECs with a mechanism by which to fully and fairly recover their costs of transporting and terminating the ILECs' local calls. And, it achieves these dual results without revamping the Commission's original plan, or disturbing its fundamental characteristics.

[36/] Id. at 61.

[37/] Case 94-C-0095, Proceeding to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Order Instituting Framework for Directory Listings, Carrier Interconnection and Carrier Compensation at 6 (Sept. 27, 1995).

The NY PSC's adoption of a two-tiered rate, with a rebuttable presumption that a CLEC's costs justify recovery at the tandem rate,[38/] mitigates the ILECs' concerns, yet retains the economically based characteristics that underlie the Commission's original reciprocal compensation plan. Moreover, it is important to note that the New York plan achieves this result without segregating ISP-bound traffic from other convergent traffic since it has found "no sound reason to treat ISP traffic differently from other convergent traffic."[39/] The NY PSC's solution successfully avoids discriminating among different types of end users, which would raise issues of the technical and economical feasibility of distinguishing among different types of traffic and unleash policy concerns relating specifically to the discrimination.

V. THE COMMISSION SHOULD GRANDFATHER THE RECIPROCAL COMPENSATION PROVISIONS FOR ISP-BOUND TRAFFIC IN EXISTING INTERCONNECTION AGREEMENTS

Lightpath urges the Commission, regardless of what approach it adopts for reciprocal compensation for ISP-bound traffic, not to modify existing contractual provisions governing reciprocal compensation except to the extent those contracts expressly and unambiguously contemplate modification of reciprocal compensation based on future changes in law. CLECs have based their business plans on the terms and conditions of these agreements, and any mid-course modification of these negotiated agreements could stifle competition by creating an unanticipated revenue shortfall. Thus, Lightpath urges the Commission to follow the NY PSC's

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[38/] CLI Order at 1-4. The NY PSC concluded that by demonstrating that "its network and service embody tandem equivalence," it successfully rebutted the presumption that it should be compensated at the end-office rate for traffic in excess of the 3:1 ratio. Specifically, the NY PSC concluded that Lightpath's network "appears to have been developed to reach a dispersed customer base," its "ratio exceeded the 3:1 standard by the smallest amount," and no party opposed Lightpath's rebuttal motion."

[39/] NY PSC Order at 61.

example and not to "modify the terms of existing contracts except to the extent those contracts, by their own terms, incorporate or defer to the tariffs affected" by the NY PSC's order.[40/]

VI. THE COMMISSION SHOULD NOT LEAVE THE ESTABLISHMENT OF COMPENSATION TO THE MARKET

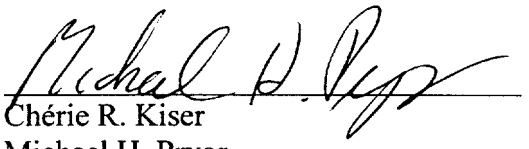
Finally, Lightpath urges the Commission to reject the concept of simply allowing the market alone to determine compensation. Although as noted previously, market forces are beginning to take effect and push rates lower, the ILECs continue to maintain far greater bargaining power than the CLECs. Thus, private negotiation is simply not yet a viable alternative, given the realities of today's marketplace.

[40/] Id. at 63-64. The NY PSC requires tariffs that contain reciprocal compensation provisions to reflect that a carrier that successfully rebuts the presumption will be paid, from the date of its filing of its rebuttable presentation, the higher rates as set forth in its interconnection agreement. Id. at 61.

VII. CONCLUSION

For the foregoing reasons and in the interest of the continued development of facilities-based competition, Lightpath urges the Commission to continue to ensure that CLECs are fairly and adequately compensated for the costs of terminating ISP-bound traffic by establishing guidelines. It thus recommends that the Commission carefully consider the approach the NY PSC adopted should it determine that modification of the existing reciprocal compensation model is warranted.

Respectfully Submitted,



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July 21, 2000

CERTIFICATE OF SERVICE

I, Dallas F. Fields, hereby certify that on this 21st day of July, 2000, I caused copies of the foregoing "COMMENTS OF CABLEVISION LIGHTPATH, INC." to be served by hand delivery or by first class mail (*) on the following:

Jane E. Jackson
Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
The Portals - 5-A225
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Jordan Goldstein,
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Dallas Fields

Dallas F. Fields

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EXHIBIT A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 99-10

CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

OPINION AND ORDER CONCERNING RECIPROCAL COMPENSATION

Issued and Effective: August 26, 1999

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